

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DORIAN ARMON BAKER,

Defendant-Appellant.

UNPUBLISHED

November 18, 2004

No. 248638

Wayne Circuit Court

LC No. 02-015172-01

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, assault with intent to do great bodily harm less than murder, MCL 750.84, and first-degree home invasion, MCL 750.110a(2). Defendant was sentenced to life in prison for the first-degree felony murder conviction, six to ten years in prison for the assault conviction, and ten to twenty years in prison for the first-degree home invasion conviction. Because defendant was sentenced for first-degree felony murder, his second-degree murder sentence was vacated. We affirm in part and vacate in part.

I

Defendant first claims that he was denied a fair trial when the prosecutor introduced improper prior bad acts evidence. In order to preserve this issue for appeal, defendant must object to the admission of the evidence at trial, and specify the same ground for objection on appeal. MRE 103(a)(1); *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Defendant objected to the evidence at trial on the basis of relevancy; however, he failed to object on the basis of improper character evidence, which is what he claims on appeal. Thus, defendant has failed to preserve this issue by failing to state the same ground for objection on appeal. *Id.* Therefore, we review the issue for a plain error affecting defendant's substantial rights. *Knox, supra*.

During trial, witness I-Sha Bennett testified that defendant called her house looking for his wife, Lynn Baker, at approximately 3:30 a.m. on December 2, 2002, and asked Bennett if they could talk, to which Bennett responded, "[T]alk about what? Talk about the way you stabbed Lynn up two weeks - - a week ago." Defendant objected on the grounds of relevancy and the trial court responded that it was not going to accept the statement for the truth of the matter asserted. Thereafter, the trial court verbally summarized the facts of the case before it

reached its verdict and included in its summary that Bennett had questioned defendant on the phone about his prior mistreatment of Baker. Defendant now claims that the trial court erroneously used this evidence in deciding defendant's guilt.

In *People v Vandervliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Michigan Supreme Court set forth the following requirements to determine whether prior acts testimony is admissible: (1) the evidence must be offered for a proper purpose under MRE 404(b); (2) the evidence must be relevant; (3) the probative value of the similar acts evidence must be substantially outweighed by its potential for unfair prejudice under MRE 403; and, (4) upon request, the trial court shall instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted. Here, the evidence that defendant had previously stabbed Baker could have been admitted under MRE 404(b)(1) to show that he intended to stab her and that the stabbing was not an accident, as defendant claimed at trial. Even though the evidence may have been prejudicial to defendant, we find that the probative value of the evidence substantially outweighed the danger of unfair prejudice. Finally, since this was a bench trial, a limiting instruction was not needed.

Defendant also claims that since the prosecutor failed to notify the defense regarding the prior bad acts evidence as required by MRE 404(b)(2), the evidence should have been excluded. However, after reviewing the record, we conclude that the prosecution did not intentionally admit the evidence, but rather, Bennett inadvertently disclosed it during her testimony. In any event, a trial court may excuse pretrial notice on good cause shown under MRE 404(b)(2).

Since the evidence in question meets all of the requirements set forth under *Vandervliet*, it was admissible prior acts evidence. Thus, the trial court did not commit a plain error affecting defendant's substantial rights by considering the evidence at trial.

II

Defendant's second issue on appeal is that his convictions and sentences for felony-murder and first-degree home invasion violate his double jeopardy rights. A double jeopardy issue constitutes a question of law that is reviewed de novo on appeal. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). It is well settled that a defendant's convictions and sentences for both felony murder and the underlying, or predicate, felony violate a defendant's protection against double jeopardy under the federal and state constitutions. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001). The appropriate remedy is to vacate the conviction and sentence for the underlying felony. *Id.* In this case, the felony-murder charge was predicated on the underlying felony of first-degree home invasion. Accordingly, we vacate defendant's conviction and sentence for first-degree home invasion.

III

Defendant argues that there was insufficient evidence to sustain a guilty verdict for his felony-murder conviction. In reviewing whether there was sufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to decide whether any rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

Felony murder consists of the killing of a human being with either the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b). *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). Intent may be inferred where a deadly weapon is used in the perpetration of the killing. *Id.*, at 759-760.

Defendant's felony-murder conviction was predicated on first-degree home invasion, which is a felony specifically enumerated in MCL 750.316(1)(b). However, defendant does not dispute that the elements of the underlying felony of first-degree home invasion were proven beyond a reasonable doubt, but rather, that the requisite intent for murder was not proven beyond a reasonable doubt.

The evidence presented at trial shows that defendant broke into Bennett's house, pulled Baker into an upstairs bedroom, forced her to the floor and sat on top her with a knife to her chest. Further evidence was presented that Baker had wounds to her hands, indicating that a struggle occurred and that she was stabbed with such force that the knife entered her chest cavity, went through her rib, and punctured her lung. Additionally, responding officers Derrick Knox and Marc Thompson both testified that the knife did not penetrate Baker in their presence. Thompson further testified that Baker was already bleeding when he and Knox entered the bedroom. In defendant's statement, he admitted that he stabbed Baker once and that she may have been stabbed again during the struggle with the police. Furthermore, defendant was heard to say that he was going to kill everyone in the house, and defendant entered the house with two Molotov cocktails. Viewed in a light most favorable to the prosecution there was sufficient evidence presented for the trial court to have found that defendant intended to kill Baker.

IV

Defendant next argues that his non-parolable mandatory life sentence for first-degree murder violated his constitutional rights because it is an indeterminate sentence and because it is cruel and unusual. However, defendant failed to properly preserve this issue for appeal, as he did not raise the issues regarding the unconstitutionality of his sentence in the lower court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994), and he cannot show a plain error that affected his substantial rights. *Carines, supra*, at 763. In any event, the claims raised by defendant have all been rejected by the appellate courts of this state. See *People v Cooper*, 236 Mich App 643, 661; 601 NW2d 409 (1999); *People v Snider*, 239 Mich App 393, 426-427; 608 NW2d 502 (2000); *People v Hall*, 396 Mich 650, 657; 242 NW2d 377 (1976).

V

Defendant argues that the trial court, sitting as the trier of fact, committed reversible error by consulting the preliminary examination transcript, containing evidence not introduced at trial, to determine defendant's guilt. Again, defendant has failed to preserve this issue, as he did not raise it before the trial court, *Grant, supra*, and we review this issue for a plain error that affected defendant's substantial rights. *Carines, supra*.

Before trial, the prosecution filed a motion to amend the information to reinstate the first-degree premeditated murder charge and the trial court granted the motion. However, in order to

rule on this motion, it was necessary for the trial court to review the preliminary examination transcript. Subsequently, defendant waived his right to a jury trial before Judge Sullivan, who also presided over the motion to amend the information. The trial commenced with Judge Sullivan sitting as the trier of fact as a result of defendant's knowing and voluntary waiver of his right to a jury trial. Defendant now claims that it was error for Judge Sullivan to sit as the trier of fact, as he had previously read the preliminary examination transcript. Specifically, defendant claims he was prejudiced by the trial court's referral to facts at trial that were presented at the preliminary examination only.

At the preliminary examination, Bennett testified that she attempted to call the police and pushed the panic button on her alarm system when she saw defendant attempting to pry her front door open, but that her phone line was dead and that the alarm system functioned through the phone line. Bennett did not mention these facts at trial. At the end of trial, the trial court summed up the evidence and, in summing up Bennett's testimony, stated, "She said she didn't give him any permission to enter; didn't want him to enter. She knew her phone lines were dead because they had been cut earlier; and, of course, her alarm system was run by the phone lines, so they couldn't do that." This evidence was only presented at the preliminary examination.

It may be error for a trial court sitting without a jury to refer to a transcript not in evidence, *Cain v Michigan Dep't of Corrections*, 451 Mich 470, 541; 548 NW2d 210 (1996), citing *People v Ramsey*, 385 Mich 221, 225; 187 NW2d 887 (1971). However, in light of defendant's own admission that he broke into Bennett's house and stabbed Baker and the overwhelming evidence of defendant's guilt, we find that this error did not constitute a plain error affecting defendant's substantial rights, as it is not likely that the outcome of the proceedings would have been different had the reference not been made. See also *People v Dixon*, 403 Mich 106, 109; 267 NW2d 423 (1978).

VI

Defendant argues that he was denied a fair trial, as the trial court's findings of fact were clearly erroneous. A trial court's findings of fact in a bench trial are reviewed for clear error, and we defer to the trial court's resolution of factual issues, especially where they involve credibility determinations. MCR 2.613(C); *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). A finding of fact is clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake has been made. *People v Hermiz*, 235 Mich App 248, 255; 597 NW2d 218 (1999).

On appeal, defendant claims that Officer Thompson's trial testimony was inconsistent and not credible. This claim is without merit. On direct examination, Officer Thompson testified that he first observed that Baker was bleeding immediately after he and Officer Knox pulled defendant off of her. Then, during a brief examination by the court, Officer Thompson testified he observed that Baker was bleeding before he and Officer Knox tackled defendant. Both Officers Thompson and Knox testified that the knife did not penetrate Baker while in their presence. The officers' testimony was consistent. Furthermore, subsequent to defendant's arrest, defendant gave a statement admitting that he had stabbed Baker once and that she may have been stabbed again during the struggle. In any event, we defer to the trial court's resolution of factual issues, especially where they involve credibility determinations, such as they do here. MCR 2.613(C); *Cartwright, supra*.

Additionally, the trial court's finding that a substantial amount of force was needed to puncture someone's lung with a knife was not improper, as it was a common-sense conclusion, rather than an opinion based on specialized knowledge. See *People v Simon*, 189 Mich App 565, 567-568; 473 NW2d 785 (1991). After reviewing the entire record, we conclude that the trial court's factual findings were not clearly erroneous.

Defendant also claims that the trial court erred by failing to consider the lesser offense of involuntary manslaughter. We need not decide this issue as it was not presented in the statement of questions presented section of defendant's brief on appeal, as required by MCR 7.212(C)(5), and therefore, is not properly before us on appeal. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

VII

Defendant next claims that his fifth, sixth, and fourteenth amendment rights were violated because he was denied the ability to make informed choices regarding his defense, denied the ability to assist his attorney and because he involuntarily waived his rights. Defendant has failed to preserve this issue, as he did not raise it before the trial court. *Grant, supra*. Thus, we will review this issue for a plain error affecting defendant's substantial rights. *Carines, supra*.

Defendant first argues that his right to confrontation was violated when he was not provided with Thompson's police report. "The Confrontation Clause guarantees a criminal defendant the right to be present at all stages of his trial and to a face-to-face meeting with the witnesses against him." *People v Burton*, 219 Mich App 278, 287; 556 NW2d 201 (1996). The central purpose behind the Confrontation Clause is to ensure the reliability of evidence against the defendant by subjecting it to rigorous testing by cross-examination in front of the trier of fact. *People v Sammons*, 191 Mich App 351, 356; 478 NW2d 901 (1991).

Defense counsel was provided with the opportunity, and did effectively cross-examine Thompson, while in defendant's presence. The mere fact that Thompson used his police report to refresh his memory had no bearing on defense counsel's ability to cross-examine him. In any event, Thompson's police report was not admitted into evidence, but was merely used to refresh his memory at trial pursuant to MRE 612(a). Furthermore, there is no indication on the record that defense counsel requested to inspect the police report or that it would not have been provided to him had he requested it. Defendant's right to confrontation was not violated.

Defendant next argues that he was not consulted regarding the decision to stipulate to certain facts throughout the trial and regarding the decision to not call certain witnesses. Decisions regarding what evidence to present and whether to call witnesses are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Attorneys have full authority to manage the conduct of the trial and determine trial strategy. *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000).

Here, defense counsel stipulated to the admission of the medical examiner's report and decided not to call several police officers and defendant's children at trial. These decisions were matters of trial strategy, which defense counsel has full authority to manage, and thus, defendant was not denied his constitutional rights by defense counsel's failure to first consult him before making the above trial strategy decisions.

Defendant next argues that his decision to waive his right to a trial by jury was not knowingly and intelligently made. The decision to waive a trial by jury ultimately rests with the defendant. MCR 6.402(B). Before accepting a waiver, the trial court must advise the defendant in open court of the constitutional right to trial by jury. MCR 6.402(B). The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. MCR 6.402(B)

Trial counsel indicated on the record before trial began that he and defendant had discussed defendant's right to a jury trial and that defendant "knows he has an absolute right to a trial by a jury." Counsel further indicated that "we collectively have decided" to proceed with a non-jury trial. Defendant did not indicate any disagreement with counsel's statement.

In compliance with the court rule, the trial court then extensively questioned defendant concerning his decision to waive the right to a jury trial. Specifically, the trial court informed defendant of his constitutional right to a jury trial, but defendant indicated that he wished to be tried by the court and signed a Waiver of Jury form that he acknowledged reading and discussing with his lawyer. Defendant was given the opportunity to ask questions about the form and declined. The record reflects that defendant knowingly and understandingly and voluntarily waived his right to be tried by a jury and that it was a matter of trial strategy reached in consultation with counsel. The issue is waived. See *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant also argues that his waiver of a hearing for the prosecution's motion to amend the information was not knowing, voluntary and intelligent. Defendant, however, has failed to provide any evidence to support his claim and we deem it abandoned.

Defendant next argues that defense counsel refused to call him as a witness at trial, despite his repeated requests that defense counsel do so. Whether a defendant testifies is a matter of trial strategy and when a defendant decides not to testify or acquiesces in his attorney's decision that he not testify, "the right will be deemed waived." *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). The record does not reflect why defendant did not testify and he never made any comment on the record that he disagreed with the decision not to offer his testimony which we take to be acquiescence in the decision. The issue is waived.

VIII

Defendant argues that his Fifth Amendment right was violated due to the interrogating officer's failure to tape record defendant's statement. However, defendant waived his right to appellate review on this issue by stipulating to the admission of his statement in the lower court. In any event, the Due Process Clause of the State Constitution does not require that custodial confessions be electronically recorded, even when the interrogation takes place in a place of detention and recording is feasible. *People v Fike*, 228 Mich App 178, 183-185; 577 NW2d 903 (1998).

IX

Defendant also claims that he was denied his right to effective assistance of counsel. Defendant did not move for a new trial or an evidentiary hearing before the trial court, and therefore, we must review this issue on the basis of the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). If the existing record does not support defendant's claims, then his claims of ineffective assistance of counsel are deemed waived. *Id.*

We find nothing in the record to support defendant's claims of ineffective assistance of counsel; to the contrary, his claims are completely devoid of merit. Accordingly, defendant was not denied the effective assistance of counsel, as he has failed to show that defense counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998).

X

Defendant's last issue on appeal is that he was denied his right to a fair trial by the trial court's discriminatory actions during trial. Defendant failed to preserve this issue for review by objecting to the alleged judicial misconduct in the lower court. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). We review this issue for a plain error affecting defendant's substantial rights. *Carines, supra*, at 763.

The statements relied upon by defendant in support of his misconduct claim do not evidence misconduct. Defendant claims that the trial court denied him access to the law, but it appears from the record that the trial court was attempting to help defendant receive accurate legal advice and a competent appellate attorney. Accordingly, defendant's argument is without merit.

We affirm defendant's convictions and sentences for first-degree felony murder and assault with intent to do great bodily harm less than murder. We vacate defendant's conviction and sentence for first-degree home invasion.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff